NG THIAM SENG & ANOR A

v.

AM FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR B
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-507-2004]
25 NOVEMBER 2008

BANKING: *Banker and customer - Duty of care when bank is paying out monies - Whether bank entitled to make progress releases of loan facility to developer after expiry of contractual completion date under property sale and purchase agreement - Whether fresh mandate is required by bank - Whether customer obliged to repay bank sums paid out without mandate* C

BANKING: *Banks and banking business - Loan facilities - Disbursement of loan - Payment by bank to housing developer under loan facilities - Whether banker may proceed to disburse payment despite failure by developer to complete construction within completion period* D

LAND LAW: *Housing developers - Breach of building contract - Whether banker may disburse loan releases to developer despite failure by developer to complete construction before completion period - Whether banker's duty extends beyond sighting Architect Certificate - Whether bank under obligation to keep vigil over progress of construction* E

F

The plaintiffs' claim arose from a loan agreement signed between the plaintiffs and the defendant bank whereby the defendant financed the purchase of a unit of condominium by the plaintiffs from the developer. The loan agreement authorized the defendant to make progress releases of the loan at designated stages of completion direct to the developer upon being presented with the certificate of completion of that stage of the supervising architect. The development was not completed within 36 months as stipulated in the Sale and Purchase Agreement, but the defendant continued to make progress releases to the developer in respect of 4 certificates of the supervising architect amounting to RM112,103.55. The plaintiffs disputed the payments and refused to pay the defendant this sum. Consequently, the defendant commenced a suit to recover the said sum from the plaintiffs. In the present proceeding, the plaintiffs sought a declaration that the plaintiffs were not bound to pay the defendant the sums paid by the defendant to the developer after the date of completion of 36 months had lapsed. G H I

Held (for the plaintiffs):

(1) Neither the Loan Agreement nor the Deed of Assignment made any provision authorizing the defendant to continue to make progress releases after the developer failed to complete the project and deliver vacant possession within the stipulated 36 months under the Sale and Purchase Agreement. On the contrary, Section 11.01 (j) of the Loan Agreement provided that if the Developer failed to physically complete the construction of the said Property within the time limit stipulated in the Sale and Purchase Agreement the plaintiffs were deemed to have committed a default on the loan, the effect of which was to cause all advances of the loan, interest thereon and all other sums payable under the agreement to become due and payable. The plaintiffs were therefore entitled to a legitimate expectation that no further progress releases would be made to the developer after it exceeded the date of completion of 36 months without a fresh mandate. (paras 24 & 25)

(2) As agent of the plaintiffs who must act in their best interest the defendant was duty bound not to continue to make the progress releases to the developer after the 36 months completion date had been exceeded and work on the project had stopped without a fresh mandate. The duty to act in the best interest of the principal includes acting with diligence. Its duty extended beyond sighting the Architect Certificate certifying the stage of completion and paying the amount to the developer. It was therefore not open to the defence that it was under no obligation to keep vigil over the progress of the construction of the condominium or that it did not have any notice of the stages of its progress. (paras 28 & 29)

(3) The four progress releases amounting to RM112,103.55 were made after the completion date and they were made without the deduction of LAD. Such releases were clearly unauthorized and therefore the plaintiffs were not liable to the defendant for the four progress releases that it made to the developer. (paras 30 & 31)

Obiter:

(1) Even assuming that the defendant was expressly authorized to continue to make such progress releases (which it was not in the instant case) it would still have had to set off all LAD due to be paid to the plaintiffs, releasing only the balance to the developer. (para 28)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Bank of Commerce (M) Bhd v. Mahajaya Property Sdn Bhd [1997] 3 CLJ Supp 413 HC ***(refd)***

Bank of Tokyo Ltd v. Mohd Zaini Arshad (Maria Pragasam, Intervenor) [1990] 1 LNS 100 HC ***(refd)***

Cheah Swee Fah v. Bank Bumiputra Malaysia Bhd & Anor [2008] 3 CLJ 132 CA ***(refd)***

Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors [2005] 8 CLJ 239 HC ***(refd)***

Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 SC ***(refd)***

Kredin Sdn Bhd v. YTF Investments Sdn Bhd [1998] 1 CLJ 205 CA ***(refd)***

Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 HC ***(refd)***

Perdana Merchant Bankers Bhd & 5 Ors v. Abdul Rahim Abdul Hamid & 4 Ors [2001] 1 LNS 265 HC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 HC ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 14A
Specific Relief Act 1950, s. 2

Other source(s) referred to:

Lee Mei Pheng and Detta Samen, *Banking Law*, 2nd edn 2002, p 31

For the plaintiffs - Harwinder Kaur; M/s AJ Ariffin, Yeo & Harpal
For the defendant - Mior Norhaidir Suhaimi; M/s Hisham Sobri & Kadir

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

[1] This is a hearing pursuant to the order obtained before the late Justice Abdul Wahab bin Said Ahmad wherein His Lordship had ordered that the plaintiffs' claim be tried by the summary procedure of O. 14A of the Rules of the High Court.

[2] The plaintiffs' claim arose from a loan agreement signed between the plaintiffs and the defendant bank (formerly MBF Finance Berhad) whereby the defendant financed the purchase of a unit of condominium by the plaintiffs from the developer Syarikat Usaniaga Sdn Bhd. The purchase is evidenced by a sale and purchase agreement dated 16 September 1995 between the plaintiffs and the developer.

[3] The loan obtained by the plaintiffs from the defendant is evidenced by:

1) Letter of Offer dated 10 October 1995;

2) Loan Agreement dated 13 December 1995;

3) Deed of Assignment dated 13 December 1995.

[4] The agreement authorized the defendant to make "progress releases" of the loan at designated stages of completion direct to the developer upon being presented with the certificate of completion of that stage of the supervising architect.

[5] By a separate arrangement the developer gave the defendant bank three letters of undertakings which *inter alia* commits the developer to return the progress releases to the defendant in the event that the developer failed to complete the development.

[6] The development was not completed within 36 months as stipulated under cl. 22(a) of the sale and purchase agreement, but the defendant continued to make progress releases to the developer in respect of 4 certificates of the supervising architect amounting to RM112,103.55 as follows:

i) RM25,870.05 on 12 November 1998

ii) RM17,246.70 on 18 October 2000

iii) RM34,493.40 on 6 February 2001

iv) RM34,493.40 on 10 August 2001.

[7] The plaintiffs disputed the payments and had refused to pay the defendant this sum. Consequently, the defendant commenced a suit to recover the said sum from the plaintiffs at the Sessions Court.

[8] In this proceeding the plaintiffs are now only seeking a declaration that the plaintiffs are not bound to pay the defendant (from whom the loan to purchase the condominium was obtained) any sums that the defendant bank had paid to the developer after the date of completion of 36 months had lapsed.

The Issues For Determination

[9] The following three questions were proposed and set during case management before the late Abdul Wahab bin Said Ahmad J by the parties for the determination of the court:

i. Whether the defendant's letter of offer dated 10 October 1995 to the plaintiffs is contemporaneous and collateral to the:

   a) undertaking given by the developer to the defendant on 25 March 1995;

   b) undertaking given by the defendant to itself on 1 December 1995;

   c) undertaking given by the defendant to the developer on 12 December 1995;

   d) Loan Agreement and the Deed of Assignment executed between the plaintiffs and the defendant on 13 December 1995?

ii. Whether the letter of offer and undertakings are the integral part of the loan transaction documents?

iii. If the court holds that the answer to the question in the aforesaid paragraphs are in the affirmative:

   a) whether the defendant was obliged to seek a refund of the loan sum from the developer when the developer breached the Sale and Purchase Agreement and its undertakings and released the plaintiffs from the obligation for repayment of the loan sum;

   b) whether the defendant was in breach of its contractual and fiduciary duties to the plaintiffs under the letter of offer and undertakings and the loan agreement by failing to obtain a refund of the loan sum from the developer when the developer breached the Sale and Purchase Agreement and its undertakings?

A **The Need For An Additional Question**

[10] To allow me the flexibility of thinking out of the box in order to arrive at a just decision, I added a fourth:

B 4. Notwithstanding the three questions posed by the parties for determination by the court, are the plaintiffs liable to pay the defendant for the 4 progress releases it made to the developer under the agreements that they signed with the defendant?

Miss Harwinder Kaur For The Plaintiffs

C **[11]** The plaintiffs (joint purchasers) contend that the defendant had paid out the progressive payments claimed by the developer notwithstanding that at the time of paying out such payment the defendant had known that the developer had failed to complete construction of the said property within 36 months from the date
D of the Sale and Purchase Agreement. The plaintiffs contend that the defendant ought not to have made the payment as this failure on the part of the developer constituted an event of default on the loan under clause 11.01(j) of the Loan Agreement cum Assignment.

E The defendant it is submitted should not have paid the developer the progressive releases after the 36 months completion period had lapsed as follows:

i) RM25,870.05 on 12 November 1998

F ii) RM17,246.70 on 18 October 2000

iii) RM34,493.40 on 6 February 2001

iv) RM34,493.40 on 10 August 2001.

G The above payments were made after the 36 months period for completion had lapsed and development work on the project had stopped.

Under clause 3.01 of the Deed of Assignment, the assignment of the SPA to the defendant was absolute wherein the plaintiffs' right
H and title to and interest whatsoever in the property including all rights and interests of the assignor or plaintiffs to the assignee the defendant is absolute. Therefore the assignment complied with s. 4(3) of the Civil Law Act 1956 which says that "any absolute assignment, by writing, under the hand of the assignor, not
I purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given

to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law …

See *Bank of Tokyo Ltd v. Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)* [1990] 1 LNS 100 and *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635. It is clear from these two cases that the assignment gives the right to the defendant to sue the developer in its own name directly as if the defendant was the purchaser of the condominium.

As the intention of the parties was that the Deed of Assignment was absolute in that the defendant should have all the rights, titles and interests of the assignor in the SPA, it is submitted that only the defendant is competent to commence an action against the developer when the developer breached the Sale and Purchase Agreement. See *Phileoallied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 where it was held that only the assignee bank has the right to sue after having acquired the interest of the purchaser by the deed of assignment. See also *Kredin Sdn Bhd v. YTF Investments Sdn Bhd* [1998] 1 CLJ 205 where the Court of Appeal held that it was only the assignee bank can enforce the rights of the purchaser under the Sale and Purchase Agreement.

There is a fiduciary relationship between the bank and the borrowers of the loan. The Federal Court case in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1 held that it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care.

The defendant in the instant case in disbursing the loan to the developer acted in the capacity of an agent for the purchaser. The defendant is holding the loan sum on behalf of the plaintiffs and is bound to release the money for the benefit of the plaintiffs. See *Hoo See Sen & Anor v. Public Bank Bhd. & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 per Salleh Abas LP:

> Thus, under no circumstances was the first respondent bound or even authorized to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorized to do so, and this must be for the benefit of the appellants.

A I submit that the defendant was in breach of its contractual and fiduciary duty by continuing to release the progressive payments to the developer on 12 November 1998, 18 October 2000, 6 February 2001 and 10 August 2001 although the 36 months period for completion had lapsed and that despite the fact that the plaintiffs B had orally notified the bank not to do so before it paid out the above sum.

[12] *Encik Mior Norhaidir Suhaimi For The Defendant*

i. MBf Property Services Sdn Bhd and MBF Finance Berhad are C two separate entities.

ii. MBf Property Services Sdn Bhd is not related to the bank.

iii. MBf Property Services Sdn Bhd is the attorney for Syarikat Usaniaga Sdn Bhd in respect of property now the subject of D this suit.

iv. The agreements signed by the plaintiffs and the defendant are the loan agreement and the deed of assignment.

v. The defendant is not liable under the loan agreement and the E deed of assignment since the defendant has not breached its obligation under the loan agreement. The defendant has at all material times performed its contractual obligation under the loan agreement, that is to remit the loan sum to the developer for the purchase of the property by the plaintiffs on the F progress payment basis under the schedule of completion upon sight of the Architect Certificate certifying the stage of completion and the amount to be paid.

vi. There is no duty on the part of the defendant to go behind G the certificate to discover whether the certification by the architect was correct and true. See *Cheah Swee Fah v. Bank Bumiputra Malaysia Bhd & Anor* [2008] 3 CLJ 132.

vii. The deed of assignment by which the plaintiffs assigned the Sale & Purchase Agreement to the defendant is not absolute. H It is merely a form of security. Hence there is no duty on the part of the defendant to terminate the Sale & Purchase Agreement which the plaintiffs signed with the developer (MBf Property Services Sdn Bhd). It must therefore follow that the defendant has a duty to keep paying the developer the progress I payment due based on sight of the Architect Certificate. On

whether an assignment is absolute or not see *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275 at 281 per Abdul Aziz Mohamad J (as he then was):

> In *Durham Brothers v. Robertson* [1898] 1 QB 765, Chitty LJ, speaking of s. 26(6) of the Judicature Act 1873, which was the precursor of our s. 4(3), said at p. 771: "It is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only". I would take that to mean that even if an assignment purports to be absolute it does not fall within s. 4(3) if it also purports to be by way of charge only.

See also *Bank of Commerce (M) Bhd v. Mahajaya Property Sdn Bhd* [1997] 3 CLJ Supp 413 per Augustine Paul JC (as he then was) at 428:

> The words that I have emphasised in cl. 1 show that the assignment is to continue only till the full repayment of the loan and interest. On repayment of the loan and interest the assignment comes to an end. The repayment of the loan advanced is an uncertain event and makes the assignment conditional.

As to whether the assignment was by way of charge only is apparent from the deed of assignment itself which states that it is granted merely for the purpose of securing the loan. See *Max-Benefit Sdn Bhd v. Phuah Thean An & Anor* [2001] 2 CLJ 70 per KC Vohrah J at 73:

> Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the purpose of securing the loan. What I have adverted to show is that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety to ensure that the loan will be repaid. The loan or any balance or part of it was given "upon the security of the same property.

viii. There are explicit terms in the deed of assignment that show the intention of the plaintiffs and defendant to make the assigment as a security to the facility and not an absolute assignment. Refer cls 2.04, 3.01 and 3.02 of the Deed of Assignment which state as follow:

2.04 Term Of Loan Agreement

It is a term of the Loan Agreement, *inter alia*, that prior to issue of the individual document of title or subsidiary title to the Property and the registration of the Charge in respect of the Property in favour of the Assignee as security for the Indebtedness, the Indebtedness shall be secured by this Assignment.

3.01 Absolute Assignment

In consideration of the Loan granted to the Assignor upon the terms and conditions contained in the Loan Agreement, the Assignor as beneficial owner hereby absolutely assigns all of the Assignor's rights and title to and interest whatsoever in the Property including all rights and interest of the Assignor in the Sale and Purchase Agreement to the Assignee as security for the Indebtedness.

3.02 Obligations Of Assignor

It is expressly agreed, however, that notwithstanding anything contained herein to the contrary, the Assignor shall remain liable under the Sale and Purchase Agreement to observe and perform all of the conditions and obligations therein provided to be observed and performed by him, and the Assignee shall have no obligation or liability under the Sale and Purchase Agreement by reason of or arising out of this Assignment, nor shall the Assignee be required or obliged in any manner to observe or perform any of the conditions or obligations of the Assignor under or pursuant to the Sale and Purchase Agreement (except to make progress releases out of the proceeds of the Loan to the Developer under the terms and conditions of the Loan Agreement) or to present or file any claim, or to take any other action to enforce the terms of the Sale and Purchase Agreement.

Submits, the defendant is not the proper party to terminate the sale and purchase agreement or to take any action under the sale and purchase agreement. The deed of assignment is only a security for the facility. See *Cheah Swee Fah v. Bank Bumiputra Malaysia Bhd & Anor* [2008] 3 CLJ 132.

ix. We have no fiduciary duty to the plaintiffs. In determining such relationship there are three general characteristics which must be present. See *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607 at 642:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Submit defendant was in no position as a fiduciary to the plaintiffs because the three above characteristics do not exist in the present case relationship.

x. Relationship between the plaintiffs and the defendant is purely contractual. Submit that the only relationship is only between a bank and a customer is merely contractual and not fiduciary. See *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors* [2005] 8 CLJ 239 (concerning overdraft). See also *Perdana Merchant Bankers Bhd & 5 Ors v. Abdul Rahim Abdul Hamid & 4 Ors* [2001] 1 LNS 265 HC. The defendant's obligation is to make payment progressively to the developer based on the Architect Certificate issued by the architect appointed. Such obligation is stipulated under cl. 5.02(e) and cl. 5.01 (last paragraph) of the Loan Agreement.

[13] *Reply By Miss Harwinder Kaur*

i. See *Banking Law*, 2nd edn 2002 by Lee Mei Pheng and Detta Samen p. 31 read with *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170. Defendant is holding the loan sum on behalf of the plaintiffs as trustee. The defendant as trustee has fiduciary obligation under s. 2 of the Specific Relief Act 1950.

ii. Plaintiffs are only claiming the interest that they have to pay the bank after the 36 months period (the time after the completion date).

Findings And Decision

[14] The crux of the dispute lies purely on the question whether the defendant was authorized to make the four progress releases to the developer after it had failed to deliver vacant possession of the condominium to the plaintiffs after the expiry of the date of completion of 36 months as stipulated in the Sale and Purchase Agreement.

[15] The fact that the plaintiffs had assigned their rights (whether absolutely or conditionally) under the sale and purchase agreement which they signed with the developer would not affect any authority which the plaintiffs might have given to the defendant to make the progress releases now in dispute; neither would the letters of undertaking which the developer gave to the defendant to return the progress releases as they were purely promises made between the defendant and the developer.

[16] The submissions of the parties based on the assignment of the sale and purchase agreement and the letters of undertakings were therefore misconceived and irrelevant and so were the three questions set out for the court to determine.

[17] The issue would therefore have to be answered under the 4th question framed by the court.

[18] The authority of the defendant bank to pay the progress releases to the developer appears in s. 6.03 (the power of attorney clause) and the bracketed portion of s. 3.02 of the deed of assignment.

[19] Section 6.03 reads as follows:

> For the consideration of aforesaid the Assignor hereby irrevocably appoints the Assignee or any of its authorized officers the attorney or attorneys of the Assignor t*o deal with the Property in any manner whatsoever to enforce all rights and remedies under the Sale and Purchase Agreement and do all other things as fully and effectually as the Assignor could do in connection therewith* ... (emphasis added).

[20] Section 3.02 reads as follows (the emphasis added):

> It is expressly agreed, however, that notwithstanding anything contained herein to the contrary, the Assignor shall remain liable under the Sale and Purchase Agreement to observe and perform all of the conditions and obligations therein provided to be observed and performed by him, and the Assignee shall have no obligation or liability under the Sale and Purchase Agreement by reason of or arising out of this Assignment, nor shall the Assignee be required or obliged in any manner to observe or perform any of the conditions or obligations of the Assignor under or pursuant to the Sale and Purchase Agreement (*except to make progress releases out of the proceeds of the Loan to the Developer under the terms and conditions of the Loan Agreement*) or to present or file any claim, or to take any other action to enforce the terms of the Sale and Purchase Agreement. (emphasis added).

[21] The Supreme Court in *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 has ruled that the act of making such progress releases by the bank to the developer under a similar loan agreement and deed of assignment was strictly as an act of an agent acting on behalf of the purchaser of the property. It regarded the bank purely as a holder of the loan sum on behalf of the purchaser to be released to the developer for the benefit of the plaintiffs.

[22] The factual matrix of *Hoo See Sen*, *supra*, appears to be almost on all fours with the instant case. In *Hoo See Sen* the plaintiffs had purchased a two-storey link house to be constructed by the developer and had obtained financing from Public Bank. As security the plaintiffs assigned their rights under the sale and purchase agreement to the bank. The developer then gave an undertaking to Public Bank that it would pay any monies due under the sale and purchase agreement to the latter. The developer failed to complete the building of the house and deliver vacant possession within 24 months as agreed under the sale and purchase agreement thereby incurring liquidated ascertained damages (LAD) due to be paid to the plaintiffs. The Supreme Court found (overruling the High Court) that an injunction would lie to restrain Public Bank from continuing to pay the developer sums which arose from the sale and purchase agreement. The rationale of the judgment appears in the judgment of Salleh Abas LP at (p. 127):

> We also observe that clause 4 of the deed of assignment clearly spells out what has been assigned and what has not been assigned. For the sake of clarity, we set out below the wording of this clause, which is as follows:
>
> > 4. For the consideration aforesaid the borrowers as beneficial owners hereby absolutely assign to the bank the said property and the full and entire benefit of the sale agreement together with all rights title and interests of the borrowers therein. Provided always that notwithstanding the assignment hereinbefore contained or any other provision of this agreement the borrowers shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrowers expressed and contained in the sale agreement.
>
> It is clear from this clause that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. Because of this, the appellants are still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase

A agreement. Payment of the balance of the purchase price, which is purportedly due from the appellants, is such liability, which is not the liability of the first respondent, but the liability of the appellants. Thus, under no circumstances was the first respondent bound or even authorized to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an B agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorized to do so, and this must be for the benefit of the appellants.

C **[23]** Section 6.03 read with the underlined portion of s. 3.02 it is clear had only pre-authorised the defendant "to make progress releases out of the proceeds of the loan to the developer under the terms and conditions of this loan agreement".

[24] But neither the loan agreement nor the deed of assignment D make any provision authorizing the defendant to continue to make progress releases after the developer failed to complete the project and deliver vacant possession within the stipulated 36 months under cl. 22(a) of the sale and purchase agreement where under cl. 22(b) the developer would be liable to pay the plaintiffs LAD.

E **[25]** On the contrary, s. 11.01(j) of the loan agreement provides that "if the developer shall fail to physically complete the construction of the said property within the time limit stipulated in the sale and purchase agreement" the plaintiffs are deemed to have committed a default on the loan, the effect of which is to cause F "all advances or the loan, interest thereon and all other sums payable under this agreement ... shall become and be deemed to be ... forthwith due and payable". The plaintiffs were therefore entitled to a legitimate expectation that no further progress releases would be made to the developer after it exceeded the date of completion G of 36 months without a fresh mandate.

[26] It is true that the deed of assignment in *Hoo See Sen* did not contain the words "to make progress releases out of the proceeds of the loan to the developer under the terms and conditions of this loan agreement" as in s. 3.02 of the deed in the instant case. But H the ratio in *Hoo See Sen* is not with respect to the existence or non-existence of such a clause but in respect of the capacity of the bank in making progress releases to the developer as an agent of the purchaser.

I

[27] In law a fiduciary relationship exists between an agent and the principal. The agent assumed an obligation of loyalty to his principal and must act under his instruction and in his best interest. In the instant case as an agent of the plaintiffs with respect to making progress releases, the defendant was obliged, in the words of Salleh Abas LP in *Hoo See Sen* to act "for the benefit" of the plaintiffs purchaser.

[28] Section 6.03 of the deed of assignment provides the defendant with the right "to enforce all rights and remedies under the Sale and purchase agreement and do all other things as fully and effectually as the Assignor could do in connection therewith …". As agent of the plaintiffs who must act in their best interest the defendant was duty bound not to continue to make the progress releases to the developer after the 36 months completion date had been exceeded and work on the project had stopped without a fresh mandate; and even assuming that the defendant was expressly authorized to continue to make such progress releases (which it is not in the instant case) it would still have to set off all LAD due to be paid to the plaintiffs releasing only the balance to the developer.

[29] The duty to act in the best interest of the principal includes acting with diligence. Its duty extends beyond sighting the Architect Certificate certifying the stage of completion and paying the amount to the developer. It is therefore not open to the defence that it was under no obligation to keep vigil over the progress of the construction of the condominium or that did not have any notice of the stages of its progress.

[30] It is common ground that the four progress releases amounting to RM112,103.55 were made after the completion date and they were made without the deduction of LAD.

[31] It follows therefore that such releases were clearly unauthorized and therefore the plaintiffs are not liable to the defendant for the four progress releases that it made to the developer.

[32] Counsel for the plaintiffs has indicated that the plaintiffs are now only seeking a declaration that they should not be liable to pay to the defendant any interest that the defendant had paid to the developer after the date of completion of 36 months. So be it.

[33] There shall accordingly be an order in terms of her wish with costs.